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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TERELL GRAY,
v.
APPLE, INCORPORATED, et al.,
Defendants.

Case No. 3:16-cv-04421-TEH

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT APPLE INC'S MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Date: November 7, 2015
Time: 10:00 a.m.
Ctrm: 2, 17th Floor
Judge: Hon. Thelton E. Henderson

Defendant Apple Inc. respectfully submits this memorandum of law in support of its motion to dismiss the First Amended Complaint ("FAC") of Terrell Gray ("Plaintiff") in its entirety, pursuant to Federal Rules of Civil Procedure 12(b)(5) and 12(b)(6).

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1 **I. PRELIMINARY STATEMENT**

2 Plaintiff filed his complaint against Apple Inc., Kelly Dorgan, Greg Hopson, the City of
 3 Berkeley, the Berkeley Police Department, and Timothy Kaplan on December 23, 2013. Dorgan
 4 and Hopson were Apple store employees at the time of the alleged incident. Kaplan is a Berkeley
 5 police officer. On March 11, 2014, Plaintiff filed a First Amended Complaint against the same
 6 defendants. Plaintiff alleges that he was discriminated against by the defendants when he
 7 attempted to return a MacBook Pro with a cracked screen to the Apple store in Berkeley,
 8 California. According to Plaintiff's FAC, the Apple employees believed that Plaintiff had stolen
 9 the MacBook Pro.¹ Therefore, they refused to accept the return and called the police. The police
 10 arrested Plaintiff, and he was institutionalized at a psychiatric facility.² Immediately after his first
 11 release from the mental health facility, Plaintiff returned to the Berkeley Apple store and was
 12 again arrested and institutionalized. Plaintiff specifically alleges violations of his rights under 42
 13 U.S.C. §§ 1981, 1982, 1983, and 1985(3). In addition, the FAC contains several other
 14 unsupported claims against the defendants including false imprisonment, assault and battery,
 15 negligent hiring, training and supervision, and intentional infliction of emotional distress.
 16 Plaintiff never served Ms. Dorgan or Mr. Hopson, nor has he served the City of Berkeley, the
 17 Berkeley Police Department, or Officer Kaplan. Plaintiff alleges five causes of action against
 18 Apple: the second, third, fourth, eighth, and ninth. All of the other causes of action are claims
 19 exclusively against the City of Berkeley, its police department, or Officer Kaplan.

20 The conclusory allegations of the FAC do not sufficiently state facts to demonstrate his
 21 entitlement to relief for any of his claims against Apple. As we demonstrate below, the entire
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23 ¹ Upon information and belief, the serial number associated with Plaintiff's MacBook Pro was
 24 discovered to be registered to another Apple customer.

25 ² The encounter at the Apple store was apparently not the only time the Plaintiff was involved in
 26 some event at a retail store resulting in his removal from a store, arrest and being taken to a
 27 psychiatric facility. According to a "Certification" (similar to a declaration) filed in this case by
 28 his former counsel, Mr. Gray was involved in an incident at a Target store in Manalapan, New
 Jersey "where the police were called and [he] was escorted out of the store and subsequently
 taken into custody[,] arrested and involuntarily confined to a mental institution." ECF No. 5,
 Certification in Opposition to Target's Motion to Quash at 2.

1 complaint should be dismissed against Apple:

- 2 • Plaintiff's §§ 1981 and 1982 discrimination claims (counts 2 and 3) must be
- 3 dismissed because the FAC lacks facts alleging that Apple or its employees
- 4 intended to discriminate against Plaintiff.
- 5 • Plaintiff's §1985(3) claim (count 4) likewise requires dismissal because the FAC
- 6 does not include any facts suggesting that Apple harbored a racial animus towards
- 7 Plaintiff or that Apple agreed with any other party to inflict harm on Plaintiff.
- 8 • Plaintiff's negligent hiring, training, and supervision claim (count 8) must be
- 9 dismissed because the FAC includes no facts suggesting that Apple knew or had
- 10 reason to know that its employees might discriminate against a person in the
- 11 course of its business.
- 12 • Plaintiff's intentional infliction of emotional distress claim (count 9) requires
- 13 dismissal because the FAC does not indicate that Apple or its employees engaged
- 14 in any outrageous conduct.

15 Additionally, although never served with a summons or the original or First Amended
 16 complaints, the claims against defendants Dorgan and Hopson should be dismissed under Federal
 17 Rule of Civil Procedure 12(b)(5).

18 The plaintiff has already amended his complaint and has had two sets of attorneys
 19 representing him. He has had ample opportunity to allege facts to support his claims and to serve
 20 the defendants he named. As he has done neither, the First Amended Complaint should now be
 21 dismissed.

22 **II. PROCEDURAL HISTORY**

23 This case may be new to this Court, but it has existed in the District of New Jersey since
 24 December, 2013. Despite the age of this case, the only defendant that has been served is Apple
 25 Inc.

26 Apple originally filed a Motion to Dismiss on May 12, 2014. Plaintiff's counsel
 27 withdrew, and the court administratively terminated Apple's motion without prejudice to afford
 28 Plaintiff an opportunity to retain new counsel or decide to proceed *pro se*. ECF No. 21, Order at

1 1. For over a year, Plaintiff appeared unprepared, or at times failed to appear at all, at several
 2 court-ordered conferences. The Court issued an Order to Show Cause for Plaintiff to explain
 3 “why this matter should not be dismissed for failure to prosecute pursuant to Fed. R. Civ. P. 41
 4 and why sanctions in the form of attorneys’ fees should not be imposed pursuant to Fed. R. Civ.
 5 P. 16(f) for Plaintiff’s failure to appear at Court conference and comply with Court Orders.” ECF
 6 No. 27, Order at 2. Plaintiff finally secured new counsel on November 5, 2015. ECF No. 44,
 7 Substitution of Attorney at 1.

8 On December 10, 2015, Apple again moved to dismiss pursuant to Fed. R. Civ. P.
 9 12(b)(2) for lack of personal jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim,
 10 and, in the alternative, requested that this action be transferred to the United States District Court
 11 for the Northern District of California. Apple also moved to dismiss the FAC against its store
 12 employees for lack of service of complaint, pursuant to Fed. R. Civ. P. 12(b)(5). In response,
 13 Plaintiff’s new counsel did not oppose Apple’s motion to dismiss Counts 1, 5, 6, and 7 of the
 14 FAC, advising the New Jersey District Court that those counts were brought exclusively against
 15 the Berkeley Police Department and Officer Kaplan. ECF No. 50, Opposition at 6. In addition,
 16 Plaintiff’s counsel stated that Plaintiff did not oppose the motion to dismiss the two Apple store
 17 employees, admitting he had never served them with the complaint and that “they are not viable
 18 defendants at this time.” *Id.*

19 On August 3, 2016, the New Jersey District Court granted the Apple Defendants’ motion
 20 and ordered this action transferred to the Northern District of California. The court did not reach
 21 the merits of Apple’s motion under Fed. R. Civ. P. 12(b)(6) or the 12(b)(5) motion. ECF No. 53,
 22 Order at 1. Apple now renews its motion to dismiss the First Amended Complaint.³

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 27 3 Plaintiff still has not served Ms. Dorgan and Mr. Hopson, so they are not parties to this action,
 28 but the FAC should be dismissed as to those defendants pursuant to Fed. R. Civ. P. 12(b)(5).

1 **III. STATEMENT OF FACTS**

2 Plaintiff Terrell Gray initiated this action in the District of New Jersey on December 3,
 3 2013. He filed a FAC on March 11, 2014. Defendants named are Apple Inc., two Apple
 4 employees who have not been served (Kelly Dorgan and Greg Hopson), the City of Berkeley, the
 5 Berkeley Police Department, and Officer Timothy Kaplan.

6 In summary, Plaintiff's claimed factual allegations are as follows⁴: in December 2012,
 7 Plaintiff ordered an Apple MacBook Pro from Best Buy. FAC, ¶ 18, 22. When the MacBook Pro
 8 arrived, he discovered that its screen was cracked. *Id.*, ¶ 18. He contacted Apple's customer
 9 service line and was directed to bring his MacBook Pro to a retail location so that it could be
 10 replaced. *Id.*, ¶ 21.

11 Plaintiff alleges that he brought his damaged MacBook Pro to Apple's Berkeley,
 12 California store on December 30, 2012. *Id.*, ¶ 22. There, he spoke to an Apple employee. The
 13 employee refused to process the exchange because he believed that the MacBook Pro had been
 14 stolen. *Id.*, ¶ 28.⁵ While arguing with the employee regarding what he now claims was a
 15 promised exchange, Plaintiff saw that a Caucasian customer "purchased and/or returned Apple's
 16 merchandise in the Fourth Street location at or around the time Plaintiff was in the store." *Id.*, ¶
 17 36. Plaintiff alleges that an Apple employee called the police based on suspicion of theft, which
 18 resulted in his removal from the store. *Id.*, ¶¶ 31-32, 38. The Complaint indicates that rather than
 19 take Plaintiff to the police station, the responding officers called an ambulance which took him to
 20 John George Hospital, a psychiatric facility. *Id.*, ¶¶ 35-38.

21 Plaintiff further alleges that on January 1, 2013, the same day that he was released from
 22 the psychiatric facility; he went back to the Berkeley Apple store seeking again to return the
 23 MacBook Pro. *Id.*, ¶ 40. The Apple employees again called the police, and Plaintiff was arrested
 24 again. *Id.*, ¶¶ 40-41. He remained in police custody until January 5, 2013, when he was

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 26 ⁴ Apple does not admit the accuracy of any facts alleged by Plaintiff.

27 ⁵ Plaintiff's "facts" have changed since the original complaint. Originally, he alleged the store
 28 employee offered to "repair the cracked screen at no cost." (Original Complaint at ¶ 26.)

1 transferred back to the John George Psychiatric Facility. *Id.*, ¶ 43. He continued to be
 2 institutionalized there until January 22, 2013. *Id.*, ¶ 44. Upon his release, he returned to New
 3 Jersey, where he was institutionalized again for over two months at the Trenton Psychiatric
 4 Hospital. *Id.*, ¶ 45. Plaintiff claims the MacBook Pro was later returned by a woman of
 5 undisclosed race and nationality. *Id.*, ¶ 46.

6 **IV. ARGUMENT**

7 **A. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN**
BE GRANTED

8 This lawsuit should be dismissed against Apple because Plaintiff's FAC fails to state a
 9 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The standard is well-known: to
 10 survive a motion to dismiss, the complaint must be supported by facts which "state a claim for
 11 relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (quoting *Bell Atl. Corp.*
 12 *v. Twombly*, 550 U.S. 544, 555 (2007) "A pleading that offers 'labels and conclusions' or 'a
 13 formulaic recitation of the elements of a cause of action will not do.' " *Id.* at 678 (quoting
 14 *Twombly*, 550 U.S. at 555). If "the well-pleaded facts do not permit the court to infer more than
 15 the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]' - 'that the
 16 pleader is entitled to relief.' " *Id.* at 679.

17 Plaintiff's complaint, however, contains only conclusory allegations against Apple, not
 18 facts required to support his causes of action.

19 **1. Plaintiff's 42 U.S.C. §§1981 And 1982 Claims (Counts 2 and 3)**

20 Claims pursuant to §§1981 and 1982 require the plaintiff to plead facts demonstrating that
 21 the defendant intended to discriminate against him on the basis of race or skin color and that
 22 discrimination occurred. *See Sims v. City & Cty. of San Francisco*, No. 14-cv00576 SI, 2015 WL
 23 1351143, at *5 (N.D. Cal. Mar. 25, 2015) (Section 1981 claim requires that a plaintiff
 24 demonstrate that: (1) he is a member of a racial minority; (2) he was intentionally discriminated
 25 against based on race; and (3) the discrimination concerned an activity enumerated in the statute;
 26 *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1527 (9th Cir. 1990) ("Racial
 27 discrimination must be shown to state a colorable Section 1982 claim.").

1 Here, Plaintiff fails to plead racial animus, intent to discriminate, or any actual occurrence
 2 of discrimination. Plaintiff's FAC contains only legal conclusions, but no factual demonstrations
 3 that Apple intentionally discriminated against him on the basis of race. For example, he states
 4 that he "was wrongfully targeted for suspicion of theft of his MacBook Pro based on his race
 5 (African-American) and/or color (Black), and subjected to civil rights violations, discrimination
 6 and other unlawful conduct at Apple's store R14 at 1823 Fourth Street, Berkeley, California."
 7 FAC, ¶16, but he pleads no facts supporting this conclusion. He alleges that Apple has
 8 "corporate-wide policies and practices" requiring "security personnel [to] target people of color
 9 for surveillance as soon as they enter Apple stores." FAC, ¶ 15. Again, he alleges no facts to
 10 support this conclusion. The Court must disregard the conclusory statements because they are
 11 unsupported by the facts pled in the Complaint.⁶ *Ashcroft*, 556 U.S. at 677. ("The tenet that a
 12 court must accept as true all of the allegations contained in a complaint is inapplicable to legal
 13 conclusions.").

14 Instead, Plaintiff alleges the following, which do not state claims for violation of the
 15 statutes or torts. He alleges:

- 16 • He entered the Apple store on December 30, 2012. FAC, ¶12.
- 17 • He attempted to exchange his MacBook Pro. *Id.*, ¶¶ 26-27.
- 18 • The Apple employee, believing that the MacBook Pro had been stolen, refused to
 19 process the exchange. *Id.*, ¶¶ 27-28.
- 20 • Apple called the police and requested Plaintiff's removal from the store. *Id.*, ¶¶
 21 31-2.
- 22 • Plaintiff saw a Caucasian customer either purchase or return an Apple product
 23 while he was attempting to make his exchange. *Id.*, ¶ 36.
- 24 • Plaintiff returned to the same Apple store on January 1, 2013. Apple employees
 25 called the police, and Plaintiff was arrested again. *Id.*, ¶¶ 40-41.

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 28 ⁶ Plaintiff alleges that Apple has "company-wide practice of discrimination" two other times in
 the FAC, also without providing any facts supporting this conclusion. FAC, ¶¶ 17, 37.

1 Nowhere does he allege *facts* showing that Apple's refusal to accept his return was due to
 2 his status as an African-American or his skin color. Instead, he directly alleges that Apple's
 3 refusal to accept the return and its subsequent call to the police was based on its employees' belief
 4 that Plaintiff had stolen the MacBook Pro. *Id.*, ¶ 36.

5 Plaintiff does not plead a single comment or action on the part of the Apple employees
 6 demonstrating any kind of racial animus or intent to discriminate. *Evans V. McKay*, 869 F.2d
 7 1341, 1345 (9th Cir. 1988) (the allegation of overt acts and racist remarks were sufficient under §
 8 1981). The FAC, however, does support Plaintiff's allegation that the Apple employees believed
 9 the laptop to be stolen, and that they based their subsequent call to the police on that belief. *Id.*, ¶
 10 28.

11 The only fact that Plaintiff relies upon to suggest the occurrence of discrimination is that a
 12 "White/Caucasian customer purchased and/or returned Apple's merchandise in the Fourth Street
 13 location at or around the time Plaintiff was in the store." *Id.*, ¶ 36. This allegation is insufficient
 14 to plausibly allege discrimination. Indeed, a plaintiff's personal belief of discrimination, without
 15 factual support, is insufficient to satisfy federal pleading standards. *See Moralez v. Whole Foods*
 16 *Mkt. California, Inc.*, No. 14-CV-05022-EMC, 2016 WL 845291, at *2 (N.D. Cal. Mar. 4, 2016)
 17 (Plaintiff's allegation that there is "no other explanation for her disparate treatment" at Whole
 18 Foods did not satisfy federal pleading standards).

19 Plaintiff never alleges that the Caucasian customer was similarly situated to him. Nor
 20 does the Complaint contain facts suggesting that the nature of the white customer's transaction
 21 was similar to Plaintiff's such that race or skin color might be a motivation for the Apple
 22 Defendants' conduct. Without more, Plaintiff's §1981 and §1982 claims are unsupported by
 23 facts.

24 2. Plaintiff's 42 U.S.C. §1985(3) Claim (Count 3)

25 Plaintiff also fails to allege facts supporting a 42 U.S.C. §1985(3) claim against Apple.
 26 "The elements of a § 1985(3) claim are: (1) the existence of a conspiracy to deprive the plaintiff
 27 of the equal protection of the laws; (2) an act in furtherance of the conspiracy and (3) a resulting
 28 injury." *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1141 (9th Cir. 2000) (citation omitted).

1 Further, “[a] mere allegation of a conspiracy without factual specificity is insufficient.” *Karim-*
 2 *Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988).

3 Here, Plaintiff only alleges that Apple’s employees called the police and assented to his
 4 removal from the store premises. These requests do not amount to an agreement to violate
 5 Plaintiff’s constitutional rights. To the contrary, the FAC alleges that Apple’s employees’
 6 communication with the police was motivated by their belief that Plaintiff had a stolen MacBook
 7 Pro. There is no factual allegation in the Complaint that Apple’s employees called the police
 8 based on a racial or class based discriminatory animus. Therefore, Plaintiff’s §1985(3) against
 9 the Apple Defendants should be dismissed.

10 3. Plaintiff’s Claim for Negligent Hiring, Training and Supervision (Count 8)

11 Plaintiff’s negligent hiring claim should also be dismissed for failure to plead any facts to
 12 support it. This claim requires a plaintiff to allege that the employer-defendant knew or had
 13 reason to know that its employee “because of his qualities, is likely to harm others in view of the
 14 work . . . entrusted to him.” *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828,
 15 836 (1992) (quotation omitted).

16 Plaintiff in this case pleads no facts suggesting that Apple had any prior notice of any
 17 alleged discriminatory bias on the part of the two employees. Moreover, Plaintiff alleges no facts
 18 showing that Apple or its employees did discriminate against him. Therefore, Plaintiff has not
 19 demonstrated that Apple may have breached a duty to prevent its employees from engaging such
 20 behavior.

21 4. Plaintiff’s Intentional Infliction of Emotional Distress Claim (Count 9)

22 Finally, Plaintiff’s claim against Apple for intentional infliction of emotional distress also
 23 fails. California law requires a plaintiff to establish the following elements in an intentional
 24 infliction of emotional distress claim: “(1) that the defendant’s conduct was outrageous, (2) that
 25 the defendant intended to cause or recklessly disregarded the probability of causing emotional
 26 distress, and (3) that the plaintiff’s severe emotional suffering was (4) actually and proximately
 27 caused by defendant’s conduct.” *Austin v. Terhune*, 367 F.3d 1167, 1172 (2004). Mere
 28 annoyances and petty oppressions do not rise to the level of outrageous conduct. *Cochran v.*

Cochran, 65 Cal. App. 4th 488, 496 (1998) (“the tort does not extend to ‘mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’”’) (citation omitted).

Plaintiff's conclusion that Apple's conduct rose to an outrageous level fails in the absence of any facts in that regard. Instead, Plaintiff merely alleges that Apple's employees declined his request to accept the return of a MacBook Pro and called the police when they suspected the computer was stolen. For this reason, this claim also warrants dismissal.

B. PLAINTIFF'S CLAIMS AGAINST KELLY DORGAN AND GREG HOPSON SHOULD BE DISMISSED FOR INSUFFICIENT SERVICE

Pursuant to Federal Rule of Civil Procedure 4(c)(1), a plaintiff must serve its defendant with the summons and complaint. Fed. R. Civ. P. 4(c)(1) (“A summons must be served with a copy of the complaint.”). When plaintiff fails to accomplish this service, the action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(5). Plaintiff has not served Dorgan or Hopson with the Summons or Complaint (or FAC). Therefore, Plaintiff’s claims against both must be dismissed.

V. CONCLUSION

The Apple Defendants respectfully request that this Court dismiss Plaintiff's First Amended Complaint against them with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(5) and 12(b)(6).

Dated: September 28, 2016

SCHIFF HARDIN LLP

By:

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Gray v. Apple Inc.

PROOF OF SERVICE

I, the undersigned, certify and declare as follows:

I am over the age of eighteen years and not a party to this action. My business address is One Market, Spear Street Tower, 32nd Floor, San Francisco, California. On the date stated below, at San Francisco, California, I served the attached document(s) on the parties in this action as follows:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT APPLE INC.'S MOTION TO DISMISS**

By electronically serving the document(s) listed above on the recipients designated on the Transaction Receipt located on the PACER website.

10 I declare under penalty of perjury that the above is true and correct. Executed this 29th
11 day of September, 2016, at San Francisco, California.

Anne E. Stenzel

SCHIFF HARDIN LLP
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